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IN THE

Supreme Court of the United States

October 1947 Term

No. 139

JOSEPH ESTIN,

Petitioner,

v.

GERTRUDE ESTIN,

Respondent.

BRIEF FOR RESPONDENT

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RESPONDENT'S BRIEF

Statement

This is an appeal by the Petitioner from an Order and judgment of the Court of Appeals of the State of New York (R. 96) and the judgment entered thereon in the Supreme Court in Queens County New York (R. 101), which unanimously affirms, Opinion by Loughran, Chief Justice (R. 97-R. 101), an Order and judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department (R. 92-R. 93) which unanimously affirmed, without opinion, the re-settled Order and Judgment, appealed from, of the Supreme Court of the State of New York, Special Term Part I, in Queens County New York, Hon. James T. Hallinan, Justice, Presiding (R. 4-7) and the opinion of Justice Hallinan (R. 81-R. 91), which order of the Special Term pursuant to Section 1171b of the New York Civil Practice Act ascertains and fixes at the sum of $2,421.90 together

with costs of $20.00 allowed (R. 6), a total of $2,441.90 (R. 7), the amount of arrears in payments for respondent's support and maintenance due from the Petitioner under a Judgment of Separation entered in said Supreme Court of New York, Queens County on October 13th, 1943 (R. 12-13) and Ordered that said Order be entered as a judgment (R. 6, R. 7) in the office of the County Clerk of Queens County, and further Ordered, that the motion on behalf of the defendant to modify the judgment of separation rendered in this Court so as to eliminate the provisions therein for the plaintiff's support is in all respects denied (R. 6); and which said Order and judgment entered thereon as directed, was entered in Queens County Clerk's office on July 9th, 1946 (R. 7) in the sum of $2,441.90, which included arrears in payments for support at the rate of $180.00 per month from May 1945 to and including June 1946, with interest, together with $10.00 costs of each motion.

Facts

The plaintiff and defendant married at Crown Point, Indiana on July 20th, 1937 (R. 82, R. 48). The Petitioner and Respondent were husband and wife and lived together from the time of their marriage above stated until their separation on April 14th, 1942 (R. 49, R. 82) at 40-45 Hampton Street, Elmhurst, Queens County, New York. The respondent has continued to live in the City of New York ever since, but the Petitioner left New York City in November of 1943 (R. 77, R. 78).

The Respondent commenced an action for separation on February 5, 1943 upon the ground that defendant wilfully abandoned her (R. 81, R. 60) and on account of his cruel

and inhuman treatment of her because he openly kept company continuously and entertained a neighbor woman, and committed adultery with her (R. 60). The Petitioner was served personally with the summons and a copy of the complaint (R. 14, R.60). The Petitioner appeared generally by attorney who served and filed a notice of appearance on February 9, 1943 (R. 14, R. 61), but interposed no answer or otherwise contested the action (R. 81). By order of the Special Term of The Supreme Court dated May 3rd, 1943, the respondent's application for judgment was referred to an official referee to hear and report to the Court. Upon the inquest taken before the official referee on May 14, 1943, the attorney representing the Petitioner appeared in his behalf (R. 81). At the hearing before the official referee a contract and modified contract, also referred to as a stipulation, dated March 16th, 1943, as amended on April 1st, 1943, was introduced in evidence and received by the referee in evidence and marked Plaintiff's Exhibit I (R. 81, R. 82). The Official Referee in his findings of fact found that the said contract constitutes a separation agreement (R. 82). Copies of the Contracts and amendments are in the Transcript of Record, Exhibit B (R. 14), Exhibit B 1, (R. 18), Exhibit B 2 (R. 21), Exhibit C (R. 22).

On October 11th, 1943, at Special Term of The Supreme Court, on motion of the *defendant's (Petitioner's)* attorney, the Court signed the judgment, with notice of settlement, submitted by said attorney. Therein the report of the Official Referee was duly confirmed, ratified and approved in all respects and thus the said contracts B, B 1, and B 2 (R. 14-R. 21) between the parties was finally adjudicated to be a Separation Agreement and it was "adjudged that the plaintiff (respondent) Gertrude Estin, be and she hereby

is separated from the bed and board of the defendant (petitioner) Joseph Estin, because of the *wilful abandonment* of said plaintiff by said defendant and it is further ordered, adjudged and decreed that the defendant, Joseph Estin, pay to the plaintiff Gertrude Estin, for her support and maintenance the sum of $180.00 per month." A copy of the said judgment is a part of the Transcript of Record herein. (Exhibit A annexed to affidavit of Gertrude Estin (R. 12).

The said judgment of the Supreme Court, Special Term, Queens County entered herein on October 13th, 1943 on motion of defendant's (petitioner's) attorney (R. 13) is the fixed, final determination of the rights of the parties. It was entered four years and four months ago and was not appealed from. No motion was made to change, amend or modify the judgment in any way until and except the motion made by the defendant (petitioner) on March 25th, 1946 to modify the said judgment (R. 67), which was denied by the Order (R. 6) appealed from herein.

Within a month after the entry of said judgment, Joseph Estin, the defendant, petitioner left New York, as aforesaid (R. 77, R. 78). The defendant (petitioner) paid for plaintiff's (respondent's) support and maintenance pursuant to the judgment of the Court and the separation agreement exhibits B, B 1, B 2 (R. 14-R. 21) until January 1944 and plaintiff (respondent) collected the amounts she has received thereunder as to $1,250.00 thereof by collecting the security deposited as recited in the separation agreement Exhibit B etc. (R. 14 etc.), and the rest she has collected by making motions by way of Orders to Show Cause in the New York Supreme Court, Queens County, pursuant to Section 1171b of the Civil Practice Act (R. 9, R. 10).

In February 1944, Mitchell Salem Fisher, the defendant's (petitioner's) attorney of record and then attorney (R. 1) asked the plaintiff (respondent) and her attorney to come to his office to discuss a possible settlement of the differences between the plaintiff (respondent) and the defendant (petitioner) (R. 64, R. 65, R. 76). The statements of defendant's attorney (Mitchell Salem Fisher, Esq.) in the course of defendant's business are the statements of the defendant himself. Mr. Fisher stated at the time as the above references show, that the defendant Joseph Estin went to Nevada in January 1944 for the purpose of suing for divorce. The defendant (petitioner) naively refers to the above negotiations between his attorney, Mitchell Salem Fisher and his wife the respondent herein and confirms that Mr. Fisher was acting pursuant to Joseph Estin's instructions (R. 26).

The Separation Agreement, contract, entered into between the parties hereto on March 16th, 1943, and amended by contract dated April 1st, 1943, and amended further by a letter dated April 12th, 1943, was signed by each of the parties and by their then attorneys (R. 1) and duly acknowledged by the parties before a Notary Public (R. 17, R. 20, R. 21, R. 22). The consideration for this Separation Agreement from the plaintiff (respondent) to the defendant (petitioner) was a separate, distinct and valuable consideration, entirely separate and apart from their marital relations and the defendant's (petitioner's) obligation to support his wife. The consideration was the refraining on the part of the plaintiff (respondent) and her then attorney (R. 1) from introducing any evidence at all of the defendant's (petitioner's) misconduct with a neighbor woman as alleged in the complaint (R. 60, R. 61).

The defendant (petitioner) Joseph Estin obtained a judgment of absolute divorce from the plaintiff (respondent) in Reno, Nevada, in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, on May 24th, 1945 (R. 40) on the ground of three years' continual separation without cohabitation.

In the two cases, the action for a separation by Gertrude Estin against Joseph Estin in Queens County, New York, in October 1943, and in the action for divorce by Joseph Estin against Gertrude Estin in Reno, Nevada in May, 1945, the parties are identical, Gertrude Estin and Joseph Estin; their character in the two cases is identical, spouses engaged in marital litigation; Mrs. Estin, the wife, was the plaintiff in the first action and Mr. Estin, the husband was the plaintiff in the second action; the issues in the two cases are identical, their marital status, their separation, whether it is termed separation, wilful abandonment, or living apart, is the same thing and was proved by identical testimony in both cases. The testimony is identical in both cases.

Both Mrs. Estin and Mr. Estin, one in New York first and the other in Reno, Nevada, eighteen months later testified they were married in Crown Point, Indiana on July 20th, 1937 (Mrs. Estin, R. 82, Mr. Estin, R. 48); that they lived together in New York City from that time until April 14th, 1942, when Mr. Estin left Mrs. Estin and their common home with the intention of not returning (Mrs. Estin, R. 81, R. 82, Mr. Estin, R. 48, R. 49). The only other testimony in the New York action was the introduction in evidence of the Separation Agreement (Plaintiff's Exhibit I, R. 82). In the Reno, Nevada divorce action there was considerable more evidence introduced, but it

related altogether to Mr. Estin's movements and residence after the date of the New York judgment and after he arrived in Nevada and was relevant only to prove his domicile in Nevada.

The time from April 14th, 1942, to October 11th, 1943, is eighteen months, the span of living apart which was found to be wilful abandonment in the New York Separation Action. Then their separation became legal by judgment of a court of competent jurisdiction. The time from October 13th, 1942 to May 24th, 1943 is eighteen months. Together makes the total of three years' "continual separation" which the Nevada Court adjudged was sufficient for it to grant the judgment of divorce. From October 13th, 1943 until May 24th, 1945 the "continual separation" by Mr. and Mrs. Estin was a legal separation decreed by the New York Supreme Court and could not be the grounds or part of the grounds for the Nevada divorce action. The Nevada Court is bound to give the same full faith and credit to the judgment of separation of the New York Supreme Court as the petitioner demands for the judgment of the Nevada Court.

Mrs. Gertrude Estin was not personally served with the summons and complaint in Nevada in her husband's divorce action in Nevada (R. 33, R. 34, R. 35). She did not appear in the action personally or by attorney (R. 37). Mr. Joseph Estin was personally served with the summons and complaint in his wife's separation action in Queens County, New York, on February 5th, 1942 (R. 14), and a certified copy of the Judgment of the New York Court (R. 12) was personally served on the defendant in the action, petitioner here, Joseph Estin, on October 27th, 1943

at New York, New York (R. 13, R. 14). The petitioner, Joseph Estin, defendant in the action, appeared by attorney and took part in his wife's separation proceedings in Queens County, New York (R. 12, R. 13, R. 81, R. 82).

Argument

The domicile of the Petitioner in 1944 and 1945 or at any other time and the good or bad faith of that domicile has nothing at all to do with the question at issue here and the points of law to be resolved.

There are four points to this case and this appeal and the decision of any one of them favorably to the respondent, independently of the other three, would determine an affirmance of the judgment of the Court of Appeals of the State of New York. They are:

I. Assuming for the purpose of this argument only, that the Nevada divorce obtained by the petitioner in May 1945, *ex parte, in rem,* by default, from his wife, the respondent, is valid to dissolve the marriage relation, does it, nevertheless, being a judgment by default, *in rem,* upon constructive service and not *in personam,* have the power to cut off vested interests of the respondent to collect $180.00 per month from the petitioner under the judgment of separation herein or under the separation agreement and are not those interests vested?

II. Did that Reno, Nevada, divorce judgment, *ipso facto,* supersede and nullify the judgment of the Supreme Court in Queens County, New York, of separation and allowance for support, entered on October 13th, 1943, or

must its validity in New York be first established by a Court of Competent jurisdiction in New York in an action brought to establish its validity, and has its validity been so established?

III. Is the judgment and decree of divorce of the parties hereto on May 24th, 1945 by the District Court of Washoe County, Nevada void because in violation of the Constitution of the United States, Article IV, Section 1? Was the District Court in Washoe County, Nevada, barred by the "full faith and credit" clause, Article IV, Section 1 of the Constitution of the United States from hearing and determining and rendering the judgment of divorce of the parties?

IV. Did the judgment of divorce which the petitioner obtained in Reno, Nevada, in May 1945, in an action in which his wife, the respondent, was not personally served with process within the jurisdiction of the Nevada Court and in which she did not appear in person or by attorney, impair the obligation of the adjudicated separation agreement between her husband, the petitioner, and herself (R. 82, R. 14, R. 18, R. 21, R. 12)?

Justice Hallinan, sitting in Special Term Part I of the Supreme Court in his decision in this case appears to have decided Points I, II and IV favorably to the respondent and gave her the money judgment appealed from (R. 67). As to Point III, Justice Hallinan writes (R. 86): "The plaintiff (respondent) urges however, that the separation judgment rendered by this court was an absolute bar to the District Court of Nevada assuming jurisdiction over the matrimonial res of the parties and rendering a judg-

ment of divorce against her, in the absence of her appearance therein. There is much that can be said for this view," and again (R. 89): "It does not necessarily follow that the divorce obtained by the husband in Nevada, jurisdictionally efficacious to dissolve the marital status of the parties, has extra-territorial effect upon the provisions for the maintenance and support contained in a pre-existing separation decree of this court, which is entitled equally with the decree of the Court in the State of Nevada, to the protection of the full faith and credit clause of the federal constitution."

The petitioner in his counsel's brief begs the question in this appeal when he states on page 4 of his brief:

2. "The divorce decree obtained by the petitioner in the Nevada Court was recognized as valid by the New York Court and terminated the status of petitioner as husband and wife."

Nowhere in the record is there any statement that the validity of the Nevada divorce decree has been adjudicated by any Court or judge or justice. Justice Hallinan in Special Term writes (R. 88, 89): "Assuming for the purposes of this discussion only, that the provisions of the stipulations referred so far as adopted in the findings of this Court, merged in its decree, it does not necessarily follow that the divorce obtained by the husband in Nevada, jurisdictionally efficacious to dissolve the marital status, has extra-territorial effect upon the provisions for the maintenance and support contained in the pre-existing separation decree of this Court which is entitled equally with the decree of the State of Nevada to the protection of

the full faith and credit clause of the federal constitution."

The Appellate Division of the Supreme Court, Second Department, unanimously affirmed without opinion the Order of Special Term of the Supreme Court (R. 92, R. 93) ther by affirming and making its own, Justice Hallinan's opinion.

The New York Court of Appeals, in its opinion (R. 98, R. 99) did not pronounce the Nevada Divorce valid. In his opinion Chief Judge Loughran writes: "We have then this situation: the full faith and credit clause commands us to accord recognition to so much of the Nevada decree as pronounced the dissolution of the marriage etc." The New York Courts gave full faith and credit to the May 24th, 1945 judgment of divorce of the Nevada Court granted to the Petitioner herein.

The question of "full faith and credit" under the United States Constitution, in fact, the Nevada judgment itself, was not before the Court at Special Term.

> "Section 1 of Article IV of the Constitution of the United States does not make a sister state judgment a judgment in another state. To give it the force of a judgment in another state it must be made a judgment there."
>
> *Williams* v. *North Carolina*, 2nd Appeal, 325 U. S. 226, 229.

In addition to the above, in the State of New York there are several decisions that until a divorce decree of another state has been validated in a court of competent

jurisdiction in New York State, such decree is not entitled to full faith and credit.

Gibson v. *Gibson,* 2nd Appeal, 266 App. Div. 975;
Canle v. *Canle,* 58 N. Y. S. 2nd 168;
Gewirtz v. *Gewirtz,* 189 App. Div. 485;
McCarthy v. *McCarthy,* 179 Misc. 623;
Jiranek v. *Jiranek,* 179 Misc. 502.

As here presented upon exhibits attached (R. 30-R. 58) to affidavits in opposition to an order to show cause pursuant to Section 1171b of the New York Civil Practice Act and upon exhibits (R. 73, R. 74) annexed to a motion, the Court is asked to accept the decree of a Nevada State Court and give it effect to supersede and nullify a prior decree or judgment of the Supreme Court of New York.

POINT I

In New York the right to alimony and support by a wife separated from her husband is entirely statutory.

There is no common law of divorce, separation or alimony in New York State: they are wholly statutory.

Borenstein v. *Borenstein,* 270 N. Y. Sup. 688, judgment affirmed 272 N. Y. 407.

Aside from the statute no New York Court has power to decree an absolute divorce or a separation and alimony. Neither the Common Law Courts nor the Court of Chancery in England have ever possessed that power. Hence the courts here never succeeded to it. They can exercise

no power on the subject of divorce except what is expressly specified in the statute.

Peuguet v. *Phelps*, 48 Barb. 566;
Galusha v. *Galusha*, 43 Hun. 181;
Erkenbrach v. *Erkenbrach*, 96 N. Y. 456;
Romaine v. *Chauncey*, 129 N. Y. 566, 571;
Cotter v. *Cotter* (1906), 225 Fed. 471.

The citation by the petitioner's counsel on page 8 of his brief of the case of *Romaine* v. *Chauncey* (*supra*), 129 N. Y. 566, points the fallacy of petitioner's argument and the cases his counsel cites in his brief. The case cited, *Romaine* v. *Chauncey*, is not at all in point. The court in that case decided that alimony is a debt but a special kind of debt which cannot be reached by the wife's creditors in proceedings supplementary to execution by a receiver to take payments by the husband on account of alimony to satisfy a judgment of the wife's judgment creditor. By applying the principle of *ad hoc* interpretation to the quotations from decisions of the Courts cited by Petitioner's counsel it is at once apparent that the cases he cites do not support his contention in this appeal. The case of *Audubon* v. *Shufeldt*, 181 U. S. 575 which he cites on page 9 of his brief is closely analagous to the above cited case of *Chauncey* v. *Romaine*, 129 N. Y. 566. The *Audubon* v. *Shufeldt* case was a bankruptcy case which held that a judgment for alimony is a debt but not the kind of debt which can be proved in bankruptcy and it is not discharged by husband's discharge in bankruptcy.

As a matter of fact the amount of support and maintenance granted to the respondent *Gertrude Estin* in the

Separation Judgment of October 13th, 1943 was fixed by the official referee and the Court (R. 88, R. 13) on account of the agreement of the parties and did not result from an adjudication of that question by the court upon conflicting proof. So the respondent's right to receive alimony in this case does not arise from domestic relations or any common law obligations of her husband.

The judgment appealed from herein is the money judgment for $2,441.90 entered herein in the County Clerk's office of Queens County New York on August 12th, 1946 (R. 4, R. 5, R. 6, R. 7) which the New York Court of Appeals in its opinion (R. 98) pronounced to be "a new final judgment". On its face it is final and unconditional.

The judgment of separation and making an allowance to the respondent herein, of October 13th, 1943 is absolute and unconditional on its face. The main feature of the judgment was the separation, the award for maintenance and support is only incidental and ancillary thereto, as is pointed out on page 11 of the Petitioner's brief. The separation judgment can be modified only by the Court which granted it and then only in the manner provided by Section 1165 of the New York Civil Practice Act, which provides that both spouses may jointly apply to the Court to annul the separation judgment, a procedure which is clearly analagous to two divorced spouses remarrying.

Upon the proof of extraneous facts as to a change for the worse in his financial condition a husband may apply to the Court which granted the separation judgment to modify the payments of alimony downward, which is the ancillary part of the judgment.

POINT II

The separation judgment and award for maintenance and support of October 13th, 1943 is absolute on its face and no power exists to modify it except as conferred by statute.

The settled doctrine in New York is that no power exists to modify a judgment for alimony absolute in terms except as conferred by statute (Sec. 1165, Civ. Prac. Act) and a judgment for future alimony is absolute on its face until modified by the Court rendering it. Such a judgment as to past due instalments falls under the general rule that it is entitled to full faith and credit in the Courts of another state.

Sistare v. *Sistare*, 218 U. S. 1,
Barber, Stella v. *Barber, George*, 323 U. S. 77.

The separation decree continues in full force and effect so long as no order revoking the decree was made pursuant to Section 1767 of the Code of Civil Procedure (now Sec. 1165 Civil Pr. Act) which section provides the exclusive method of revoking or terminating a decree of separation.

It is the settled law of this state (New York) that the only method by which a decree of separation can be revoked is that prescribed by Sec. 1767 of the Code of Civil Procedure (now 1165 Civ. Pr. Act) and the only method by which it can be annulled is that set forth in Section 1771, Code of Civil Procedure (now 1170 Civ. Pr. Act) and in each instance it can be done only by the Court.

Gewirtz v. *Gewirtz*, 189 A. D. 485,
Bartenbach v. *Bartenbach*, 271 A. D. 799.

The judgment of October 13th, 1943 for separation and for the support and maintenance was absolute and fixed the rights of the parties, it was in no way discretionary. When the motion to give a money judgment for the accumulated arrears in payments for support and maintenance was made, the Justice in Special Term had no discretion but to give judgment for the amount he would find to be due. The right conferred by the New York Civil Practice Act to modify a Separation judgment for a husband under obligation to pay alimony, upon a change in his financial condition, is upon the proof of extraneous facts as provided in the Act. If he proves the facts the Justice is bound to modify the judgment as to the amount of alimony to the extent that the proof shows should be done. The Justice has no discretion.

In the present case where the amount of alimony was fixed by the Court adopting the amount fixed by the parties' separation agreement (R. 88) there certainly was no discretion given to any Court which would later be called on to pass on the question.

> The validity of an agreement for support cannot be questioned until and unless it is set aside or brought up for review in a court of competent jurisdiction.
>
> *Braunsworth* v. *Braunsworth*, 260 App. Div. 113;
> *Goldman* v. *Goldman*, 282 N. Y. 296;
> *Brice* v. *Brice*, 225 App. Div. 453;
> *Jackson* v. *Jackson*, 290 N. Y. 512.

In the case of *Barber* v. *Barber*, 217 N. C. 422 the Court in its opinion wrote:

> "The orders made from time to time are of course, res judicata between the parties, subject to the power of this court to modify them. The con-

solidation of the amounts due, when ascertained in one order or decree does not invest any of these orders with any other character than that which they originally had. If the defendant is in court only by reason of the original service of the summons, he is in court only for such orders as upon motion, are appropriate and customary in the proceeding thus instituted. There is no reason why a judgment should not be rendered on an allowance for alimony, which is a debt—and more than an ordinary one."

The defendant being a party to the action and being given due notice of the motion, is bound by such decree, and the plaintiff is entitled by law to all of the remedies provided by law for the enforcement thereof.

Vaughan v. *Vaughan*, 211 N. C. 354.

A subsequent decree of divorce on constructive service does not end husband's obligation under or the enforceability of prior decree for separate maintenance of wife and minor children, where the separate maintenance decree was not modified by court action.

Simonton v. *Simonton*, 40 Idaho 751, 42 A. L. R. 1463, 1475.

A decree of a Washington State Court granting a divorce and awarding alimony payable in future instalments constitutes proper basis for a suit in another jurisdiction (Alaska) under the full "faith and credit" clause of the federal constitution, as to instalments past due.

Cotter v. *Cotter*, 225 Fed. Rep. 475.

In the opinion in the above cited case of *Cotter* v. *Cotter*, the cases of *Israel* v. *Israel*, 148 Fed. Rep. 576 (C. C. A. 3),

Lynde v. *Lynde*, 181 U. S. 183 and *Sistare* v. *Sistare*, 218 U. S. 1 are cited.

Upon the proof of the proper and necessary facts a Court of Equity has jurisdiction to modify any kind of judgment. Freeman on Law of Judgments, vol. 3.

That any judgment may be modified by a court of competent jurisdiction upon the proof of extraneous facts does not make any judgment conditional.

Article IV, Section 1, of the United States Constitution does not mention final judgments, or conditional judgments. It commands that the courts of every state shall give "full faith and credit" to the judgments of the courts of every other state, and the act of Congress implementing the section of the Constitution commands that the courts of each state and of the United States shall give to the judgments of the courts of the other states such "full faith and credit" as the judgment has in the courts of the state in which it is given.

The decision of the Honorable, the Supreme Court of the United States in two late cases:

Atkins v. *Atkins*, 326 U. S. 683 (1946);
Griffin v. *Griffin*, 327 U. S. 220 (1946).

does not change the effect of the above-cited cases or altar the effect of well established principles of law on the *Estin* case.

In the *Atkins* case which in its facts and principle of law is very similar to the case of *Esenwein* v. *Commonwealth*, 325 U. S. 279, the only question at issue was whether Mr. Atkins' Nevada divorce was valid because his domicile there

had been bona fide and thus gave the Nevada Court jurisdiction to grant the divorce. The Illinois courts had held that his domicile in Nevada was a sham and fraudulent on the Nevada Court and therefore the Nevada Court was without jurisdiction and his Nevada divorce therefore invalid. The United States Supreme Court vacated the decision of the Illinois Supreme Court and remanded the case to be retried in consideration of certain cases which it cited. The effect of an *ex parte* Nevada divorce on a prior judgment of the Circuit Court of Lincoln County, Illinois, was not in the case. In fact, Mr. Atkins' divorce judgment pre-dated Mrs. Atkins' separation action.

In the *Griffin* case, Mrs. Griffin had two Orders of Special Term of the Supreme Court of the State of New York to docket as judgments, arrears of alimony granted her in a prior action for a Separation and support in New York. The first motion was on notice to Mr. Griffin. He appeared in the New York Court and opposed the motion. Mrs. Griffin prevailed and the amount of arrears of alimony was computed and ordered docketed and paid. This was in 1935. In 1938 Mrs. Griffin made another motion for arrears which had accumulated since her 1935 motion. No notice of the second motion was given Mr. Griffin and he did not appear to contest it. It was granted *ex parte*. Mrs. Griffin then sued for the total of both amounts of arrears, over $3,000.00 in the United States District Court for the District of Columbia, where Mr. Griffin resided, and the District Court gave judgment for the full amount sued for to Mrs. Griffin. Mr. Griffin appealed to the Supreme Court of the United States, which reversed and modified the judgment of the United States District Court, letting Mrs. Griffin have judg-

ment for the amount of arrears up to the date of her order of 1935 but disallowing the amount of arrears adjudged due her in the Order of 1938 on the grounds that the New York Supreme Court order in 1938 was not due process of law because Mr. Griffin had not been served with notice of motion.

Mrs. Griffin with her order of 1935 was in a position similar to that of Mrs. Estin in the present case. There was due process of law there because Mr. Griffin appeared and contested the proceeding. In this case Mr. Estin was served with notice of the Order to Show Cause dated February 20th, 1946 (R. 8) and appeared in Court by attorney and contested the Order to Show Cause (R. 23). Section 1171b of the New York Civil Practice Act, pursuant to which the Order to Show Cause commencing these instant proceedings were commenced, had not been enacted when Mrs. Griffin made her motions in 1935 and 1938 respectively. The constitutionality and due process of law in proceedings pursuant to Section 1171b of the New York Civil Practice Act has been affirmatively passed upon. *Durlacher* v. *Durlacher*, 173 Misc. 329.

In allowing Mrs. Griffin to have judgment for the amount of her arrears up to 1935, the United States Supreme Court followed its decisions in *Sistare* v. *Sistare*, 218 U. S. 1 and in *Barber, Siella* v. *Barber, George*, 323 U. S. 77.

In this instant proceeding there has always been due process of law. The orders to show cause have always been served on petitioner's attorney-in-fact (R. 17) and attorney of record (R. 1) in this instant case (R. 66) and always brought about on an appearance by the petitioner, by attorney.

POINT III

The judgment of divorce granted to the petitioner in Reno, Nevada on May 24th, 1945, *ex parte* and by default, *in rem*, had no effect on the separation judgment and the award for the respondent's support and maintenance, of the New York Supreme Court of October 13th, 1943.

Durlacher v. *Durlacher*, 123 Fed. 2nd, 70 cert. den. 315 U. S. 805 1941 (CCA 9th);
Bassett v. *Bassett*, 141 Fed. 2nd 954, cert. den. 323 U. S. 718 (1944 CCA 9th);
Barber v. *Barber*, 323 U. S. 77.

The facts in the *Durlacher* case are briefly as follows:

The Durlachers lived and were married in Westchester County, New York; differences arose between them and they separated. Mrs. Durlacher brought action in the Supreme Court in Westchester County for separation and support and maintenance. Durlacher was personally served with the summons and complaint in New York State. The case was tried and judgment was given to Mrs. Durlacher for separation, and decreeing her prescribed monthly amounts which the defendant was ordered to pay her for her support and maintenance. Thereafter Mr. Durlacher went to Nevada and stayed there long enough to acquire a "residence" as required by the Nevada statute and commenced an action for divorce there against his wife, in New York. Service on Mrs. Durlacher was by constructive service. She was not in Nevada, was not served with process in Nevada and did not appear in the divorce action either in

person or by attorney. The Nevada State Court granted Mr. Durlacher an absolute divorce from his wife. Thereafter Mrs. Durlacher applied by way of an order to show cause for an Order to be entered as a judgment for arrears in the payments due her for support and maintenance under her judgment of separation in Westchester County pursuant to Section 1171b of the Civil Practice Act (*Durlacher* v. *Durlacher*, 173 Misc. 329). Mr. Durlacher appeared in New York and contested the motion for a money judgment. Mrs. Durlacher prevailed and a money judgment for the amount of the arrears was awarded her. She afterwards obtained two more Orders for money judgments. The amount of the three money judgments then being over $3,000.00 she sent them out to Reno, Nevada to be sued on there in the United States District Court for the District of Nevada, and collected.

The United States District Court permitted recovery of the first two money judgments which were for arrears which had accumulated up to the date of Mr. Durlacher's Nevada divorce decree, but held that the recovery of the third was barred by the Nevada divorce decree. The United States District Court dismissed Mrs. Durlacher's action on the third money judgment on the grounds that the divorce granted to Mr. Durlacher in Nevada superseded the New York separation judgment and put an end to his matrimonial liablities, and that to enforce the New Judgment was repugnant to the law of Nevada and that the law of Nevada was the law which the District Court should regard and enforce (*Durlacher* v. *Durlacher*, 35 Fed. Supp. 1005). Mrs. Durlacher appealed to the United States Circuit Court of Appeals, Ninth Circuit, which reversed and remanded the above judgment of the United

States District Court. The opinion of the United States Circuit Court of Appeals states:

"Since the New York Supreme Court had acquired and retained jurisdiction in personam over Simon, he had the right to appear in the action there and plead the fact, for it is but a fact from the standpoint of the New York tribunal that the Nevada divorce decree had ended the matrimonium and hence the right to maintenance during the separation had terminated.

Nevertheless in New York, Simon could have brought a suit in which he would have been entitled to show that the Court had lost jurisdiction in the maintenance proceeding. If successful he could have restrained Helen from procuring execution or suing on her New York judgment in that maintenance proceeding. However he could not have prevailed in such a separate suit because the divorce decree he would have pleaded as causing the lack of jurisdiction in the maintenance proceeding was obtained without Helen's appearance therein or her presence in Nevada or her service within that State. New York holds invalid a divorce decree so obtained. Hence, in New York, Helen's maintenance judgment was secure from collateral attack and would be given full faith and credit in that jurisdiction.

Simond contends, however, that such faith and credit should not be given it since the present suit was instituted in Nevada and the Nevada United States District Court was bound to apply the law of the State of Nevada. The Nevada Law was claimed to be that upon the dissolution of the marital tie the court in which the prior maintenance proceeding was pending lost jurisdiction to render a judgment for maintenance sums. That is to say, the Nevada

Federal Court could refuse to recognize the New York judgment because repugnant to Nevada Law.

The Supreme Court has repeatedly held that under the "full faith and credit" clause of the Constitution (extended by the statute to the Court below) a judgment of a sister state must be enforced, even though the cause of action upon which the judgment is based is repugnant to the law of the State requested to enforce it."

The above decision was followed and reaffirmed by the same Court on substantially the same facts in the later case of *Bassett* v. *Bassett*, 141 Fed. 2nd 954 (C. C. A. 9th, 1944) cert. den. 323 U. S. 718 (1944).

The facts in the case of *Bassett* v. *Bassett* (*supra*), are exactly similar to the facts in the *Durlacher* case (*supra*) and to the *Estin* case under consideration.

Mr. and Mrs. Bassett lived in Nassau County, New York. They had a family of minor children. They disagreed and separated. Mrs. Bassett in 1934 commenced an action for a separation in the Supreme Court in Nassau County, and was given a judgment and was granted a decree for money for the support of herself and children payable monthly. Mr. Bassett went to Nevada but apparently not for the purpose of getting a divorce. He bought a ranch and went into business there and paid taxes and voted. He did not commence his divorce action until he had lived in Nevada four or five years. Apparently Mr. Bassett sent payments due under the separation decree in the New York Court after he went to Nevada. When he stopped making payments, Mrs. Bassett applied to the Supreme Court of New York, Nassau County, for a money judgment for the amount of arrears pursuant to section 1171b of

the New York Civil Practice Act and an Order was entered as a judgment for the amount of arrears then due. Mrs. Bassett did not proceed to collect this judgment but waited and later obtained a second Order entered as a judgment in the same kind of proceeding for arrears in payments of money for her support from the date of her first judgment to the date of her second judgment. The amount of the two judgments entered was over $3,000.00, the amount required to give to the United States District Court jurisdiction and both judgments were sent to Reno and an action started in the United States District Court for the District of Nevada against Mr. Bassett for the amount due on both judgments.

After the entry of Mrs. Bassett's first judgment for arrears, in New York, Mr. Bassett commenced an action for divorce in Nevada against his wife in New York. Mrs. Bassett was served with the summons and complaint by publication and by mail. She was not in Nevada, was not served with process personally in Nevada, and did not appear in the case either in person or by attorney and Mr. Bassett obtained a judgment of divorce by default after a hearing as required by the Nevada Statute. The divorce decree gave Mr. Bassett an absolute divorce, freed him from the bonds of matrimony, gave him the custody of the minor children, and freed him from any and all obligations to pay his wife any money for her support and maintenance as provided in the New York judgment in the separation action. It was after the entry of divorce in the Nevada State District Court that Mrs. Bassett obtained her second Order entered as a judgment for arrears of payments due for her support and maintenance,

In the action in the District Court of the United States for the District of Nevada on her money

judgments for arrears, the United States District Court gave Mrs. Bassett judgment for the amount of her first judgment for arrears, up to the time her husband obtained his divorce and refused to give her judgment for the amount of her second New York judgment on the ground that the judgment was for amounts which became due after the date of the Nevada divorce judgment which put an end to Mr. Bassett's matrimonial obligations including his liability to make payments as required by the New York judgment.

Bassett v. *Bassett*, 51 Fed. Supp. 545.

Mrs. Bassett appealed to the United States Circuit Court of Appeals, Ninth Circuit, which overruled and reversed the judgment of the United States District Court for the District of Nevada and remanded the case and directed that Mrs. Bassett be given judgment for the full amount of both of her judgments. The United States Circuit Court of Appeals based its decision on the case of *Durlacher* v. *Durlacher* (*supra*) which it had decided but a few months previously.

In its decision the Court writes:

"Where the New York Court in a wife's separate maintenance action acquired jurisdiction over both husband and wife, the Nevada State Court had no jurisdiction in husband's subsequent divorce action to relieve husband of his obligation under judgment in separate maintenance action and hence Nevada divorce decree was not a bar to wife's action in the Nevada Federal District Court against husband on New York judgments which wife obtained for accrued alimony, after the divorce decree."

The Bassett case was decided in 1944 *after* the decision by the Supreme Court of the United States of the first appeal in the case of *Williams* v. *North Carolina*, 317 U. S. 287. Mr. Bassett argued that since he had a bona fide domicile in Nevada his default divorce was entitled to "full faith and credit" under *Williams* v. *North Carolina* (*supra*), decided a year earlier, and hence his decree barred recovery under the separation agreement. On deciding this question the United States Circuit Court of Appeals in its decision writes further:

> "In the case of *Durlacher* v. *Durlacher*, 123 Fed. 2nd 70, we reviewed the procedure of the New York Court in circumstances substantially identical to those herein and held that since the judgment entered in the New York Court was in all respects a valid judgment, it could not be set aside or affected by a judgment of a Court in another state. Counsel argue that the *Durlacher* case was decided upon the theory of *Haddock* v. *Haddock*, 201 U. S. 562, that the *Haddock* case was reversed by *Williams* v. *North Carolina*, 317 U. S. 287, and therefore the *Durlacher* case is not a precedent upon which a decision in the instant case can be rested.
>
> We believe that the *Williams* case does not affect the result reached in the *Durlacher* case. The State of New York had acquired jurisdiction over both parties to this appeal in the original separate maintenance action and, according to its law, retained jurisdiction throughout the proceedings leading to the two judgments questioned herein. In those proceedings William Bassett could have appeared and pleaded any defense that he may have had, but this he failed to do. Had he appeared in the New York proceedings subsequent to the granting of the orig-

inal decree and been unsuccessful, his recourse would have been in the appellate courts of New York and in the Supreme Court of the United States.

As here presented we are asked to accept the decree of a Nevada Court which, in effect, attempts to set aside decrees or judgment of a court of New York. This is the point in this appeal and, *Williams* v. *North Carolina* (*supra*) has absolutely nothing to do with it."

The refusal of the United States Supreme Court to review the above decision is significant and would seem clearly to indicate agreement with the reasoning of the U. S. Circuit Court of Appeals.

In the history of the above cited cases of *Durlacher* v. *Durlacher*, 123 Fed. 2nd 70 and *Bassett* v. *Bassett*, 141 Fed. 2nd 954, it appears, conclusively, that *Simon Durlacher* and *William I. Bassett*, both of them, opposed their wives' Orders to Show Cause for Money Judgments, respectively, pursuant to Section 1171b of the New York Civil Practice Act, from the very inception of the proceedings in each case, as appears in the reports of the case in Special Term of the New York Supreme Court, *Durlacher* v. *Durlacher*, 173 Misc. 329 (1840) and as appears in the Record on Appeal to the United States Circuit Court of Appeals, Ninth Circuit, in the case of *Bassett* v. *Bassett*, 141 Fed. 2nd 954 (1944). The decision of Special Term of the New York Supreme Court (Kings County), granting Mrs. Bassett's motion for a money judgment was published in the New York Law Journal, March 26, 1941, Vol. 105, No. 70, page 1349, column 6. Not elsewhere published. In its decision in the *Bassett* case, the Court referred to the *Durlacher* case.

Thus it appears in the printed and published reports and records of the cases, that *Messrs. Durlacher* and *Bassett* were in just the same position in which Mr. Estin finds himself. The *Durlacher* and *Bassett* cases are parallel with the instant *Estin* case.

As here presented, on an exhibit attached to affidavits annexed to a motion (R. 73) and annexed to affidavits (R. 30, R. 58) in opposition to the Order to Show Cause herein pursuant to Section 1171b of the New York Civil Act, the Court is asked to accept the decree of a Nevada State Court, which did not have personal jurisdiction of the defendant there, respondent here, because she was not in Nevada and was not personally served with the summons and complaint, within the jurisdiction of the Court, and give to that decree effect to supercede and nullify a prior judgment of the Supreme Court of New York, of which the Nevada Court had notice in the pleadings in the case before it. After a trial of the same facts between the same parties on the same issues, the New York Court gave the wife a separation and support, the Nevada Court gave the husband a divorce eighteen months later. This is the point in this appeal and domicile has nothing to do with it. The decisions in both appeals of *Williams* v. *North Carolina*, 317 U. S. 287 and 325 U. S. 226 do not apply. The *Williams* case was a criminal case and this Honorable Court in that case was not considering and did not pass on the possible effect of Mr. Williams' and Mrs. Hendrix' Nevada divorces on prior judgments in a matrimonial case or cases in the State of North Carolina.

The application for a writ of certiorari in the above case of *Bassett* v. *Bassett* was denied in October 1944. Two

months later, in December 1944, the United States Supreme Court decided the case of *Barber* v. *Barber*, 323 U. S. 77, *supra*, in which identical facts and circumstances were in issue.

In deciding the above *Barber* case the United States Supreme Court held:

> "A money judgment of a court of North Carolina for arrears of alimony, not by its terms conditional and on which execution was directed to issue, held, under the law of that State, not subject to modification or recall; and under the Federal Constitution and the Act of May 26th, 1790, as amended entitled to full faith and credit."

In its decision of the above case of *Barber* v. *Barber*, this Honorable Court cited and followed the same cases and precedents as were cited and followed in the *Durlacher* and *Bassett* cases and in the briefs and decisions of the Courts below in the instant case under consideration. Constant iteration and reiteration of the same law and cases is not called for every time such a matrimonial action is carried to the Court of Last Resort of a state. No different or novel aspect of the problem is presented by the petitioner here.

See also, Pennoyer v. *Neff*, 95 U. S. 714.

POINT IV

Mrs. Estin's right under the New York Statute to have a money judgment for the past due instalments due to her for support and maintenance is a right of property which cannot be taken from her except by due process of law.

Barber v. *Barber*, 21 How. 582.

> "Alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as is in any other judgment for money."

Lynde v. *Lynde*, 181 U. S. 183 (1898);
Sistare v. *Sistare*, 218 U. S. 1 (1909).

The respondent has vested property rights to the alimony awarded by her separation judgment as to past due instalments.

Livingston v. *Livingston*, 173 N. Y. 377 (1903);
Hayes v. *Hayes*, 220 N. Y. 596 (1917);
Harris v. *Harris*, 259 N. Y. 334, 337 (1932);
Karlin v. *Karlin*, 280 N. Y. 32 (1939);
Waddy v. *Waddy*, 290 N. Y. 251 (1943);
Krauss v. *Krauss*, 127 A. D. 740 (1908).

The dates of the above cited cases show that the "Vested Interest" doctrine, as Petitioner's counsel terms it on page 18 of his brief, is old and not new and has not arisen in New York State since the first decision by this Honorable Court in *Williams* v. *North Carolina*, 317 U. S. 287, *supra*.

POINT V

The contract entered into by and between Joseph Estin, the petitioner and his wife, Gertrude Estin on March 16th, 1943, modified by contract dated April 1st, 1943 and further modified by letter dated April 12th, 1943, which had been adjudicated a separation agreement is still a legal, valid, binding and existing contract between them and its obligation is not impaired by the divorce judgment given to Joseph Estin in Nevada on May 24th, 1945.

The argument by Petitioner's counsel on page 38 of his brief that the separation agreement was a mere temporary stipulation to guide the Court, is specious.

A study of the contract (R. 14-R. 22) shows that it was carefully prepared by the parties and their then lawyers (R. 1). They took four weeks, from March 16th, 1943 to and including April 12th, 1943 and three separate writings to make their contract. The intermediate contract of modification dated April 1st, 1943, reaffirmed (R. 20) the first contract dated March 16th, 1943.

In paragraph 9, the last paragraph (R. 17) of the first contract dated March 16th, 1943 clearly shows that the contract was intended to be effective irrespective of any court decree. Paragraph 9 (R. 17) reads:

"9. Whenever for the purpose of enforcing any right of the plaintiff under this stipulation or under such decree, if entered, it becomes necessary for the plaintiff to obtain the services of any process or paper or notice of any kind upon the defendant, the defendant hereby appoints his attorney,

Mitchell Salem Fisher, Esq. of 30 Pine Street, New York City, as his agent and attorney-in-fact to receive the service of any such process or paper or notice of any kind whenever the defendant cannot with reasonable diligence, be found in the City of New York."

It is to be noted that the conjunction "or" in the second line of said paragraph 9 is a disjunctive conjunction and makes the power of attorney effective either under "such decree if entered" or under the stipulation. The notices and affidavits (papers) required to be served by paragraph 6 of the contract (R. 16) were served on the attorney-in-fact named in said paragraph 9 (R. 9), to collect the $180 00 per month from January 1944 to and including July 1944, long after the entry of the Judgment of Separation on October 13th, 1943 and after the defendant Petitioner, Joseph Estin, had left New York (R. 46, R. 11, R. 78) and Mrs. Estin did collect $180.00 per month for seven months up to and including July 1944. The attorney-in-fact, Mitchell Salem Fisher and the other trustee named in the contract, Edward C. Morsch, Esq., Mrs. Estin's original attorney of record (R. 1). Both attorneys, Edwin C. Morsch Esq. and Mitchell Salem Fisher Esq. had executed the said contract and modifications thereof together with their respective clients (R. 17, R. 20, R. 22).

The defendant, Petitioner, and his then attorney, Mitchell Salem Fisher, Esq., showed in April 1944 that they considered the aforesaid contract and modifications, one instrument (R. 20 par. 5) to be continuing in effect six months after the Separation was judgment is proved by the letter Mitchell Salem Fisher wrote to the respondent's then attorney (R. 22, Exhibit C) purporting to revoke Joseph

Estin's appointment of Mitchell Salem Fisher Esq. as his agent and attorney-in-fact to receive the service of any process or paper or notice of any kind. If, as Petitioner contends the said contract became a nullity because the Court did not specifically by word approve the contract, then such notice as Mr. Fisher gave (R. 22) was entirely unnecessary.

Mr. Fisher's appointment as Mr. Estin's agent and attorney-in-fact for the purpose stated is a power of attorney coupled with an interest and is irrevocable (R. 62).

> A power of attorney to sue a third party on a covenant of which the grantor of the power had agreed that the grantee should have the benefit as security for his indemnity, is a power of attorney coupled with an interest and is irrevocable.
>
> *Raymond* v. *Squire*, 11 Johnson's Rep. 47;
> *Farrell* v. *Amberg*, 8 Misc. 220.

In the Farrell case the above cited case of *Raymond* v. *Squire* is cited with approval in the opinion of Justice Bishoff in 8 Misc. 220 at page 226.

> A power of attorney given to secure the payment of money advanced on a contract is a power coupled with an interest and is irrevocable.
>
> *Day* v. *Candee et al* 7 Fed. Cases 231 at page 238 (U. S. Cir. Ct. of Appls 2nd Cir.).

> Power of Attorney to receive service of summons for an insurance company writing policies in state other than its home state is irrevocable.
>
> *Johnston* v. *Mut. Res. Life Ins. Co.*, 45 Misc. 31;
> *Woodward* v. *Mut. Res. Life Ins. Co.*, 178 N. Y. 486.

Because the Separation Agreement contains the phrase (R. 15) "subject to the approval of the court:" the petitioner (R. 27) and his counsel on page 38 of his brief herein urge that, because the official Referee and the Justice who signed the Separation Judgment did not make the contract a part of the judgment they therefore did not approve of it and that therefore upon the entry of the judgment of Separation on October 13th, 1943 the contract ceased to have any force or effect.

Such is not the law of the State of New York. The contract was made in the State of New York by citizens of New York residing in New York as part and parcel of an action at law pending between them in the Supreme Court of the State of New York. The law of New York governs the making and interpretation of the contract.

The official referee received the Contract, in three parts, in evidence, as one exhibit (R. 81, R. 82). That it was received in evidence and marked as an exhibit, and found as a fact (R. 82, 5) "That the plaintiff and the defendant have entered into a separation agreement dated March 16, 1943, as amended by a stipulation dated April 1st, 1943, and further amended by a letter dated April 12th, 1943, all of which have been received in evidence as one exhibit marked Plaintiff's 'Exhibit I'", conclusively shows that the official referee considered the agreement, in three parts, relative and material evidence in the case and by reference to it in detail accepted and adopted it. By reference and ruling on it in its entirety and making a finding of fact, that it is a separation agreement, he gave it his approval. By its judgment, the court ratified and affirmed and approved the report of the official referee in all respects,

which includes the finding of fact that the contract in question is a separation agreement.

> "The practice of incorporating into a final divorce judgment such an agreement as this was condemned in *Kunker* v. *Kunker*, 230 A. D. 641 in forceful and unmistakable language. The court pointed out that there is nothing in the statute which gives jurisdiction to incorporate into such a judgment the formal private agreements made by the parties as to a division of their property and the like. Its inclusion in the judgment here has accomplished no more than to give rise to a misconception of the real scope of the decree and to consequent unnecessary litigation. The court should not be called upon to separate the agreement into various parts, construe them and determine how much, if any, of the obligations assumed by the defendant should be held to be for alimony and how much for reinstatement of plaintiff in any property rights of which she may have been deprived."

Schnitzer v. *Buerger*, 237 App. Div. 625.

Justice Hallinan in Special Term of the Supreme Court in his decision held that the contracts and stipulations between the two parties had been approved and adopted by the referee and the Court (R. 87, R. 88). The Appellate Division by affirming the judgment of Special Term, approved and affirmed Justice Hallinan's ruling.

The Court of Appeals of the State of New York in its opinion (R. 100) must have had the Separation Agreement of these parties in mind and concurred in the views of Justice Hallinan and the Appellate Division when it wrote in its opinion "and in *Jackson* v. *Jackson*, 290 N. Y. 512, we

held that a court which lacked jurisdiction over the person of a husband was powerless to set aside a separation agreement in an action brought against him by his wife."

If that sentence quoted does not apply to the contracts in question between the parties hereto it has no applicability to this case.

> There is no question but that in a proper case where the alimony has been explicitly fixed even though by means of an appropriate agreement approved by the Court and embodied in the judgment, the court may alter the amount to a sum which it deems fair to require a defendant to pay toward the support of his wife and children. The power intrusted to the courts by sections 1155 and 1170 of the Civil Practice Act exists none the less where such a direction follows the agreement of the parties (*Kunker* v. *Kunker, supra; Holahan* v. *Holahan*, 234 A. D. 572; *Lowenthal* v. *Lowenthal*, 229 A. D. 446; *Goldfish* v. *Goldfish*, 193 A. D. 686; *Staehr* v. *Staehr*, 237 A. D. 843.
>
> *On the other hand, manifestly no power resides in the Court to alter a valid agreement as between the parties who made it and who may declare upon it for relief as upon any other contract.*"
>
> *Schnitzer* v. *Buerger*, 237 A. D. 625.

POINT VI

The District Court in the Second Judicial District of the State of Nevada did not have and could not assume jurisdiction of the subject matter in the divorce action of *Estin* v. *Estin*.

The Second Judicial District Court of the State of Nevada was barred from hearing, trying and adjudicating the divorce action of *Estin* v. *Estin*, on May 24th, 1943 by Art. IV, Sec. 1 of the Constitution of the United States and by the act of Congress which implements it, 28 U. S. C. A. sec. 687, which commands that "The records and judicial proceedings of the courts of any State shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the courts of the State from which they are taken."

The judgment of Separation of the New York Supreme Court, dated October 13th, 1943, was before the Nevada Court in Reno, Washoe County, Nevada on May 24th, 1945, in the pleadings (R. 31) and in the testimony given at the hearing by Joseph Estin (R. 48). The District Court in Nevada found as a matter of fact in its Findings of Fact that said judgment exists (R. 39).

Barber v. *Barber*, 21 How. (62 U. S.) 582;
Atherton v. *Atherton*, 181 U. S. 155;
Harding v. *Harding*, 198 U. S. 317;
Sistare v. *Sistare*, 218 U. S. 1;
Michigan Trust Co. v. *Ferry*, 228 U. S. 346;
Grubb v. *Public Utilities Comm.*, 281 U. S. 470, 479;
Magnolia Petroleum Co. v. *Hunt*, 320 U. S. 430.

In May 1945, when Joseph Estin commenced his divorce action in the Second Judicial District Court in Reno, Nevada, and in the same month when the hearing was had in the same Court, the judgment of Separation of the Supreme Court of New York, Queens County, between the same parties, was a valid binding judgment which could not have been attacked by the defendant either directly or collaterally.

> A judgment binding in the State where rendered is equally binding in every state.
>
> *Harding* v. *Harding*, 198 U. S. 318 (*supra*);
> *Williams* v. *North Carolina*, 2nd Appeal, 325 U. S. 226.

> A judgment upon the merits in one suit is *res adjudicata* in another under the "full faith and credit" clause, where the parties and the subject matter are the same not only as respects matters actually presented to sustain or defeat the right asserted but also as respects any other available matters which might have been presented to that end.
>
> *Grubb* v. *Pub. Util. Comm.*, 281 U. S. 470, 479 (*supra*).

As pointed out on page 4 of this brief the judgment of separation and support was granted to the respondent, Gertrude Estin, because of the wilful abandonment of said respondent by the petitioner, Joseph Estin. In the Nevada Court, the plaintiff there, petitioner here, Joseph Estin, was granted a divorce from the defendant there, Gertrude Estin, respondent here, on the grounds of "three years continual separation". No matter what name is applied the facts in both cases are identical.

As appears in the findings of fact of the learned Official Referee attached to the judgment roll in the Queens County, New York, Separation case (R. 81, R. 82) and in the copy of the judgment roll of the Nevada Divorce action (R. 38, R. 39, R. 48, R. 49) Mr. and Mrs. Estin were married at Crown Point, Indiana on July 20th, 1937. They lived together as man and wife in Queens County, New York until April 14th, 1942 when Joseph Estin left his wife, the respondent and their home and has been away ever since.

On October 13th, 1943, the judgment of separation and maintenance, after due personal service of the summons and a copy of the complaint on the defendant, Joseph Estin, petitioner here, in New York City, New York State (R. 12, R. 14), was granted to the plaintiff—respondent Gertrude Estin in the Supreme Court in New York, Queens County, and from that date the separation became legal.

To make up the three years "continual separation" on which grounds the Nevada Court granted the divorce, the first eighteen months from April 14th, 1942 to October 13th, 1943, was the same fact which had been tried and adjudicated in the New York Supreme Court on the same issue between the same parties.

> When a state of facts is tried and adjudicated between the same parties on the same issue in a Court having jurisdiction of the parties and the subject matter, the same facts may not be re-adjudicated in another action, whether of the same or a different name, in a court of the same or another state.
>
> *Harding* v. *Harding*, 198 U. S. 317 (*supra*);
> *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430 (*supra*);
> *Barber* v. *Barber*, 21 How (62 U. S.) 582 (*supra*).

The above case of *Barber* v. *Barber* is cited and followed in the above cited case of *Harding* v. *Harding*. Both cases, *Barber* v. *Barber* and *Harding* v. *Harding* are cited and followed in the case of *Magnolia Petroleum Co.* v. *Hunt* (*supra*). The case of *Harding* v. *Harding* is cited in the case of *Davis* v. *Davis*, 305 U. S. 32 at page 41 and the *Davis* case is cited with approval in *Williams* v. *North Carolina*.

The facts in the case of *Barber* v. *Barber*, 21 How. 582 (*supra*) which are analagous to the facts in the instant case of *Estin* v. *Estin* and are briefly as follows:

> Mrs. Barber, in 1846, in New York obtained a judgment of divorce from bed and board and for suitable support and maintenance (the modern separation action) and brought suit for arrears in payments for her support and maintenance in the United States District Court for the District of Wisconsin in 1847, to which state the husband had gone, after his wife started her divorce action in New York, in order to avoid making any payments. When Barber went to Wisconsin it was still a territory. After it was admitted to the Union in 1847, as a State, Mr. Barber commenced an action in a Wisconsin State Court, in Dodge County, for absolute divorce *a vincolo* from his wife on the grounds that his wife had wilfully abandoned him. Mrs. Barber was not personally served with the summons and complaint in Wisconsin, was not in Wisconsin and did not appear in the action or answer. In the divorce action in Wisconsin the husband did not disclose the circumstances of the divorce *a mensa et thora* in New York. In the action by Mrs. Barber to collect the arrears of alimony in the United States District Court, Mr. Barber, in his answer set up his Wisconsin divorce and claimed that it superseded and an-

nulled the judgment and decree for support and maintenance. The United States District Court gave judgment for the amount prayed for to Mrs. Barber and (apparently) Mr. Barber appealed to the Supreme Court of the United States.

The United States Supreme Court affirmed the Judgment of the United States District Court and held that a *divorce a vincolo* obtained in Wisconsin and upon the allegation by the husband that the wife had wilfully abandoned him cannot release the husband there and everywhere else from his liability under the decree made against him in New York.

The judgment in New York legalizing the separation precluded the possibility that the same separation could constitute wilful abandonment of the husband by the wife.

The above cited case of *Barber* v. *Barber* is followed in *Sistare* v. *Sistare*, 218 U. S. 1; in *Audubon* v. *Shufeldt*, 181 U. S. 577; in *Barber, Stella* v. *Barber George*, 323 U. S. 77, 80. It is cited and followed in United States Circuit Courts of Appeal in *Cotter* v. *Cotter* (C. C. A. 9) 225 Fed. Rep. 471, 475 in *Israel* v. *Israel* (C. C. A. 3) 148 Fed. Rep. 576; in *Syracuse Trust Co. ex rel. Woodward* v. *Woodward* (C. C. A. 2, 1947) 173 Fed. Supp. 667, 162 Fed. 2nd 415.

In the *Magnolia Petroleum Co.* v. *Hunt* case, *supra*, the Court wrote in its opinion:

"Under the full faith and credit 'clause and the Act of Congress implementing it, what has been adjudicated in one State is *res adjudicata* to the same extent in every other State. The purpose of the' full faith and credit 'Clause was to establish throughout the federal system the salutary principle of the common law, that litigation once pursued to judgment

> shall be conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other state.
>
> "Because there is a 'full faith and credit' clause a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into judgment and a plaintiff may not for his single cause of action secure a second or a greater recovery."

The case of *Harding* v. *Harding* (*supra*) decided in 1904 is cited with approval in *Magnolia Petroleum Co.* v. *Hunt* (*supra*), decided in 1943 .

Will Joseph Estin, the defendant-Petitioner, be here heard that he a second time has "challenged the validity of his wife's, the respondent's right, which had ripened into a judgment" of separation and maintenance in the New York Supreme Court a year and a half before he commenced his divorce action in Nevada?

The Nevada Court was informed in the trial of the Estin divorce action (R. 31, R. 39, R. 48) and took notice of the separation judgment in this case in the Queens County, New York Supreme Court and brushed it aside (R. 39) as not "*res adjudicata* of the matters alleged in Plaintiff's Complaint."

> "State Courts cannot avoid review by the United States Supreme Court of their disposition of a Constitutional claim of casting it in the cover of an unreviewable finding of fact."

Williams v. *North Carolina*, 2nd Appeal 352 U. S. 226. The judgment in New York legalizing the separation pre-

cluded the possibility that the same separation could constitute desertion of the husband by the wife.

Barber v. *Barber*, 21 How. 582 (*supra*)

The Law is the same in New York.

The common law Rule:—"No man shall be twice vexed for one and the same cause"—would seem to be its own interpreter. In order that the rule may be applied with uniform precision, the courts have held that certain entities must concur to make a second action a second vexation. The two actions must have substantially the same parties who sue and defend in each case in the same respective character, the same cause of action, and the same object. The proper test seems to be whether the same evidence would sustain both. If the same evidence would sustain both, the two actions are considered the same and the judgment in the former action is a bar to the subsequent action although the two actions are different in form. It has been said that this method is the best and most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties and it has even been designated as infallible.

Lipkind v. *Ward*, 256 A. D. 74, 78.

The general rule is well settled that the estoppel of a former judgment extends to every material matter within the issues which were expressly litigated and determined and also to those matters which although not expressly determined are comprehended and involved in the thing expressly stated and decided whether they were or were not actually litigated or considered. It is not necessary to the conclusiveness of a former judgment that issue

should have been taken on the precise point controverted in the second action. Whatever is necessarily implied in the former decision is for the purpose of the estoppel deemed to have been actually decided.

Reich v. *Cochran*, 151 N. Y. 122, 127;
Lorrillard v. *Clyde*, 122 N. Y. 41;
Williamsburg Savings Bank v. *Town of Sodom*, 136 N. Y. 465;
Pray v. *Hegeman*, 98 N. Y. 351;
Smith v. *Smith*, 79 N. Y. 76.

It is the law in Nevada.

Vickers v. *Vickers*, 45 Nev. 274, 198 Pac. 76, 202, Pac. 31, 32.

In the *Vickers* case, Mr. and Mrs. Vickers lived in West Virginia. Mrs. Vickers sued there for a separation on the ground of extreme cruelty. Mr. Vickers was in West Virginia, was personally served there with the summons and complaint, appeared in the case in person and by attorney, filed an answer and contested the action. Mrs. Vickers prevailed and got a judgment of separation and alimony for her support and maintenance. Mr. Vickers went to Nevada and in due course sued for divorce on the grounds of extreme cruelty. Mrs. Vickers appeared in person and by attorney in the case and answered. In her answer set up the judgment of the West Virginia Court as a bar to Mr. Vickers' divorce action. The Supreme Court of Nevada held that the prior judgment of separation granted by the West Virginia Court was a bar to the Nevada divorce action and dismissed Mr. Vickers' complaint.

In its decision the Nevada Supreme Court cited and followed the case of *Harding* v. *Harding*, 198 U. S. 317 (*supra*).

The facts in *Harding* v. *Harding* are exactly analagous to those in the instant case, *Estin* v. *Estin*.

Mr. and Mrs. Harding lived, and were married in Illinois. They quarrelled and separated. Mrs. Harding commenced an action for divorce from bed and board in the Circuit Court of Cook County (Chicago) and prayed for judgment for support and maintenance, the kind of action which is defined an action for separation in the New York Civil Practice Act. Mr. Harding appeared in the action and contested it. After trial judgment was given to Mrs. Harding and a decree was entered, allowing her a certain sum of money payable monthly for her separate maintenance, and support. Thereafter, Mr. Harding moved to California and after living there a little over a year to establish a residence under the California statute he commenced an action for divorce from his wife on the grounds of "wilful desertion", which is one of the grounds for divorce under the California Statute. Mrs. Harding appeared in the divorce action and contested it. In her answer denied the allegations of the complaint and the case was tried on its merits. Mr. Harding prevailed and the divorce was granted. Mrs. Harding appealed to the Supreme Court of California, which affirmed the decree. The case came to the United States Supreme Court on error to the Supreme Court of California. In its decision the Supreme Court of the United States held:

"The issues involved in the Illinois case and the California case were practically the same and under the 'full faith and credit' clause of the Constitution, the California Court should have held that the Il-

linois judgment was an estoppel against the assertion of the husband that the wife's living apart from him was through any fault on her part or amounted to desertion. From these conclusions, it necessarily follows that the issue presented in this action for divorce was identical with that decided in the suit in Illinois for separate maintenance. This being the case, it follows that the Supreme Court of California in affirming the judgment of divorce failed to give to the decree of the Illinois Court the due faith and credit to which it is entitled, and thereby violated the Constitution of the United States.

The judgment of the Supreme Court of California must be therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion."

The case of *Atherton* v. *Atherton*, 181 U. S. 155 (*supra*), is briefly as follows:

Mr. and Mrs. Atherton had their matrimonial domicile in Kentucky which was the domicile of the husband before marriage. They were married in Clinton, Oneida County, New York, where Mrs. Atherton lived before her marriage. After marriage, they at once went to Kentucky and resided there as man and wife. In Kentucky their child was born. Mrs. Atherton left her husband in Kentucky and returned to her mother's home in Clinton, New York, taking their child with her. Mr. Atherton filed a petition against his wife in a Court in Kentucky for a divorce from the bond of matrimony for her abandonment which was a grounds for divorce by the laws of Kentucky; and alleged on oath, as required by the Kentucky Statute that Mrs. Atherton might be found at Clinton, New York. The clerk as required by the Kentucky statute, entered a warning order to the wife to appear in sixty days, and appointed an

attorney-at-law for her. The attorney wrote to her at Clinton N. Y. advising her of the object of the petition, and enclosing a copy thereof in a letter addressed to her, by mail, to that place, and having on the envelope a direction to return it to him, if not delivered in ten days. A month later the attorney, having received no answer made his report to the Court. Five weeks afterward, the Court, after taking evidence, granted the husband an absolute divorce for the wife's abandonment of him. The action was commenced December 28, 1892 and the decree of divorce entered in Kentucky on March 14th, 1893.

While the husband's divorce action was pending in Kentucky, Mrs. Atherton commenced an action in the Supreme Court of New York, Oneida County, for a divorce from bed and board, now defined an action for a separation, on the ground of cruel and abusive treatment of the plaintiff by the defendant on account of which and without fault on her part, she was compelled to leave her husband. The defendant, Mr. Atherton, appeared and answered his wife's action in Oneida County, New York, in June 1893, after his Kentucky divorce had been granted, and in his answer denied the cruelty charged, and set up the decree of divorce from the bond of matrimony obtained by him in Kentucky against his wife as a plea in bar.

The Supreme Court of New York found that the wife was not personally served with process within the State of Kentucky or at all, nor did she in any manner appear or authorize an appearance for her. The Court decided that the decree of the Court in Kentucky was inoperative and void as against the wife and no bar to the New York action; and gave judgment in her favor for a divorce from bed and board and for the support of herself and child.

The judgment was affirmed by the General Term of the Supreme Court of New York (82 Hun 179) and by the Court of Appeals of the State of New York (155 N. Y. 129).

Mr. Atherton applied to the Supreme Court of the United States for a *writ of certiorari* which was granted and after hearing the appeal, the Supreme Court of the United States reversed the judgment of the Court of Appeals of the State of New York and held that the Kentucky Court had jurisdiction to try the divorce action and that its judgment of divorce was a bar to the New York action, under the Constitution of the United States Art. IV, Sec. 1.

The case of *Atherton* v. *Atherton, supra,* was cited with approval and followed in both appeals in the case of *Williams* v. *North Carolina.*

POINT VII

The doctrine laid down by the New York Court of Appeals in the judgment appealed from is in accord with sound public policy.

Recent decisions of the Federal Courts are in accord with the Opinion of Chief Judge Loughran of the New York Court of Appeals in the case of *Estin* v. *Estin.*

In the case of *Gray* v. *Gray,* 61 Fed. Supp. 367 (E. D. Mich. 1945), a husband avoided service in his wife's separation action in the Wayne Co. (Detroit) Michigan State Court by going to Nevada where he obtained a default divorce. Mrs. Gray was not personally served with process within the jurisdiction of the Nevada Court. Mr. Gray later returned to Detroit. His wife received a separation

judgment awarding alimony in the Michigan State Court, and when he refused to pay she obtained a contempt order. Mr. Gray then sued in the United States District Court for the Eastern District of Michigan for an injunction to prevent the enforcement of the contempt order, on the theory that his Nevada decree was a bar. His contention was rejected in an opinion by Picard, D. J.

> "A divorce granted according to the laws of Nevada should be given full faith and credit by Michigan courts, although *bona fides* of divorcing party's domocile could be questioned.
>
> "A Michigan State Court could proceed with wife's separate maintenance suit notwithstanding that husband had obtained a Nevada divorce and the Federal Court would not prevent Michigan Courts' contempt order for husband's failure to pay alimony."

Judge Picard then cites the distinction made by the Supreme Court of the United States in *Williams* v. *North Carolina*, between the legality of the divorce and the property rights of the parties and cites the cases cited in the case of *Williams* v. *North Carolina* on this point, among them, *Olmstead* v. *Olmstead*, 216 U. S. 386 and *Hood* v. *McGehee*, 237 U. S. 611, Judge Picard notes that the cases cited refer to real property interests only, and then cites the late case of *Price* v. *Ruggles*, 244 Wis. 187; 11 N. W. 2nd 513, which was decided after the decision in *Williams* v. *North Carolina*.

Judge Picard writes:

> "The Wisconsin decision states that 'under the circumstances involved, if the divorce in Nevada destroyed the wife's marriage status, she might, upon

personal service upon the former husband, no alimony or dower having been awarded her by the divorce judgment, prosecute a suit in equity for alimony out of his property. It would seem that in this State (Wisconsin) a wife situated as was the first wife might bring an action for alimony even though the husband had no real estate or other property within it. Else a man worth a million dollars in personal property might leave the state, take all his property with him, go to Nevada and get a judgment for divorce after staying there sixty days and thus throw his wife and the burden of her support on the public."

In the case of *Price* v. *Ruggles, supra,* Mrs. Price got her judgment for alimony in the Wisconsin State Court and further got judgment for the arrears in payments of the alimony against the administrator of her husband's estate (he had later died) against the claims of husband's second wife.

Judge Picard writes further in his opinion in the case of *Gray* v. *Gray* (*supra*):

> "Not only is this the view of the Supreme Court of the United States, the Supreme Court of Wisconsin, but the long standing decision governing the position of Michigan Courts was laid down in *Van Ingwagen* v. *Van Ingwagen,* 86 Mich. 333; 49 N. W. 154, 156, which states as follows: 'the facts set up in the cross bill relative to defendant procuring a divorce in the State of Indiana would not, if true, oust the Circuit Court in Chancery for Hillsdale County of jurisdiction.'"

In 1947, seven months ago, two cases were decided in the Federal Court in the Southern District of New York,

or rather, one case was decided in the United States District Court on May 28th, 1947 and the judgment in the same case was affirmed on Appeal in the United States Circuit Court of Appeals, Second Circuit on July 1st, 1947. In

Security Trust Co. of Rochester, N. Y. v. *Woodward and Woodward,* District Court of the United States, So. Dis. of N. Y., John Bright, J., 73 Fed. Supp. 667

Mr. and Mrs. Woodward lived and married in New York. They separated and Mrs. Woodward sued in New York for a separation and support for herself and minor son. Mr. Woodward was served personally in New York and appeared and contested the action. Judgment of separation and custody of the minor son was granted to Mrs. Woodward and she was awarded substantial alimony for the support of herself and her son. Mr. Woodward went to Nevada and stayed there sufficient time to acquire a domicile and commenced an action for divorce there against his wife in New York. Mrs. Woodward was not in Nevada, was not served personally within the jurisdiction of the Nevada Court and did not voluntarily place herself within its jurisdiction by appearance in person or by attorney. Woodward removed all of his property and possessions out of New York except the trust funds in the bank of the plaintiff, the Security Trust Co. of Rochester, N. Y. which trust had been sequestered in proceedings started in the Supreme Court of the State of New York to collect her alimony. Woodward undertook, by notice to the Trust Company, to stop payment to her. The Trust Company inter pleaded both Mr. and Mrs. Woodward in the action brought in the United States District Court for the So. District of New York.

Mr. Woodward set up the claim that his Nevada divoree superceded and annulled Mrs. Woodward's Separation judgment and was a bar to her collecting any more alimony from the plaintiff, Trust Co.

On the above facts Judge Bright of the U. S. District Court rejected the husband's contention as unsound and held that the wife was entitled to summary judgment, awarding to her the funds on deposit in the action and entitling her to continue to receive support under the separation judgment regardless of the status of the Nevada divorce as such. His opinion dated May 20, 1947, shows that the law is clear and admits of no doubt, stating:

> "As the provisions in New York for alimony were in personam, that portion of the Nevada decree *in rem* did not affect or abrogate the alimony provisions in the New York judgment. The Nevada Court did not have jurisdiction of Mrs. Woodward in personam; she was not served with process in Nevada; she did not submit to jurisdiction there; and her property rights established by a valid judgment (to which also full faith and credit must be accorded), were not affected."

Mr. Woodward appealed and the United States Circuit Court of Appeals consented to hear the appeal without delay on the typewritten record. On July 1st, 1947, the ruling of Judge Bright was unanimously affirmed in a decision reading as follows:

> "*Per Curiam*: Affirmed on the authority of *Esenwein* v. *Esenwein*, 325 U. S. 279; *Estin* v. *Estin*, 296 N. Y. 308 and *Bassett* v. *Bassett*, 141 Fed. 2nd. 954 (C. C. A. 9.)" 162 Fed. 2nd 415.

As stated in the opinion of Chief Judge Loughran of the New York Court of Appeals in the instant case (R. 100)

"Counsel have cited no Nevada statute or decision to the contrary nor any Nevada case in which a divorce granted in that State against an absent wife was held to have cancelled an earlier judgment for alimony awarded to the wife in the State of her domicile."

The above law as decided by the above cited Federal cases is the law in Ohio; *Manny* v. *Manny;* 59 N. E. 2nd, 755 (1944) in Wisconsin, as above stated, *Price* v. *Ruggles,* 244 Wis. 187 (1943) in Iowa; *Bennett* v. *Tomlinson,* 206 Iowa 1075; 221 N. W. 837 (1928).

> "An unmodified judgment in personam in a court of competent jurisdiction of a foreign State which is then the matrimonial jurisdiction of both husband and wife for the maintenance of the wife, payable in monthly instalments is entitled to the protection of 'the full faith and credit' clause under the constitution as to all matured instalments, even though subsequent to the entry of such judgment, the judgment defendant departs from the matrimonial domicile and obtains in this state (Iowa) a naked decree of divorce on service by publication."

Mrs. Bennett obtained her judgment for separation in Illinois. Mr. Bennett afterward went to Iowa and obtained a judgment of divorce from his wife in Illinois on service by publication.

In anoher Iowa case: *Miller* v. *Miller,* 200 Iowa 1193, 1201, the Supreme Court of Iowa, held:

> "So far as the personal and property rights of the defendant spouse as distinguished from her status are concerned, courts of equity are not wanting either in power or ingenuity to fully protect them within

> their territorial jurisdiction, notwithstanding the dissolution of the marriage status by a foreign decree."

It is the law in Idaho,

Simonton v. *Simonton* (1925), 40 Idaho 751, 42 R. L. R. 1463, 1475, the Supreme Court of Idaho held:

> "A subsequent decree of divorce on constructive service does not end husband's obligation under or the enforceability of prior decree for separate maintenance of wife and minor children, where the separate maintenance decree was not modified for court action."

It is the law in Michigan as above stated as established in the case of *Van Ingwagen* v. *Van Ingwagen*, 86 Mich. 333: 49 N. W. 154. The case cited by Petitioner's counsel on page 34 of his brief *McCullough* v. *McCullough*, 203 Mich. 288 does not change the rule, the facts are not the same.

It is the law in Arkansas.

Wagster v. *Wagster* (Arkansas) 103 S. W. 2nd 639.

It is the law in New Jersey.

Bolton v. *Bolton*, 86 N. J. L. 626. 92 Atl. 391;
Bennett v. *Bennett*, 63 N. J. Eq. 308.

It is the law in North Carolina.

Arrington v. *Arrington*, 127 N. C. 195.

In Maryland:

Chappel v. *Chappel*, 86 Md. 543.

And in Indiana:

Rogers v. *Rogers*, 46 Ind. App. 509.

The example given by Petitioner's counsel on pages 19 and 20 of his brief does not correctly state the New York Law. If Mr. A. is separated from his wife by a New York judgment decreeing a separation and alimony for Mrs. A. whether Mr. A. leaves New York or stays. If he afterward learns that his wife has committed adultery *one time and can prove it*, he doesn't need to wait until his wife begins proceedings under 1171-b of the New York Civil practice act, he should stop paying alimony and bring an action for divorce in New York on the grounds of adultery. *If he proves* the adultery he will get his divorce and his wife would get no more alimony. But let us continue the example given by the opponent's counsel, supposing that Mr. A. sues for divorce on the grounds of adultery, in Arizona, his wife being served by publication and mailing and not appearing in the case, and gets his divorce. When Mrs. A. starts proceedings to get a money judgment for arrears of alimony under section 1171-b of the New York Civil Practice Act and Mr. A. then comes to New York and instead of opposing the proceedings started by his wife, begins an action in the New York Supreme Court to obtain a declaratory judgment (New York Civil Practice Act, Sec. 473), making his Arizona divorce judgment a judgment of divorce in New York. Because his Arizona divorce is a judgment in rem, Mrs. A. would have the right to come into the New York Court and defend, and Mr. A. would have to prove the adultery of his wife over again. If he did prove it, he would pay his wife no more alimony. Mrs. A.'s proceedings under 1171-b would be stayed pending the trial of Mr. A.'s action upon showing by Mr. A. of the probability of his success.

The cases cited by Chief Judge Loughran in his opinion in the instant case (R. 99) are authority for this.

If the contention of the petitioner were well founded in law and the judgment of the New York Court of Appeals in the case of *Estin* v. *Estin* were reversed, there are thousands of men all across the country, separated from their wives by Separation or Limited Divorce Judgments and paying them alimony pursuant to the same judgments who would at once betake themselves to a State of quick divorce and there sue for divorce on the ground of "three years separation", or some other grounds and get the divorce and then be forever free of supporting their wives. *Such is not the law.*

CONCLUSION

For the above reasons, respondent respectfully submits that the judgment of the Court of Appeals of the State of New York be affirmed and that the judgment of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe dated May 24th, 1945 (R. 40, R. 41) in the case of Joseph Estin, plaintiff vs. Gertrude Estin, defendant, by which an absolute divorce from the defendant was granted to the plaintiff be declared void and invalid, and that the respondent should be granted such other relief as may be proper in the premises and be awarded the proper costs pursuant to statute and the rules of this Court, and in this particular that consideration be given to the expenses and damages sustained by the respondent in opposing the petition for a Writ of Certiorari herein and in opposing the petition for a Rehearing of the Petition for a Writ of Certiorari.

Respectfully submitted,

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